FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - Petitioner

versus

JEAN MOORE REED - - - - Respondent

RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

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CLYDE W. REED - - - - - *Petitioner*

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JEAN MOORE REED - - - - *Respondent*

RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

Respondent, through her counsel, respectfully moves the Court pursuant to the provisions of Supreme Court Rule 56(4) to adjudge to her reasonable damages for her delay,[1] occasioned by the petition for certiorari filed by petitioner on the ground that it appears from the record, the petition, the brief in opposition, and the respective appendices to the petition and the brief in opposition, there was no ground for granting such a writ, and in support thereof states the following:

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[1]The Court of Appeals of Kentucky stayed enforcement of its Mandate dated October 12, 1972, for 90 days from October 25, 1972 (Petition, Appendix E, p. 89). On January 16, 1973, it entered an order granting an additional stay to and including March 23, 1973.

NO GROUND FOR GRANTING SUCH A WRIT

This Court denied the petition for a writ of certiorari on February 20, 1973. The record before this Court together with the brief (and appendix) and the brief in opposition (and appendix) clearly establish that there was no ground for granting such a writ; that the writ was frivolous and sought merely for purposes of delay.

A petition for certiorari arising out of a monetary award to a wife in a divorce action should be particularly suspect of being without ground for review by this Court and frivolously imposed for purposes of delay. Compare *Bohn* v. *Bohn,* 316 U. S. 646, 62 S. Ct. 1283.

REASONABLE DAMAGES SHOULD BE IMPOSED AS A MATTER OF POLICY

The Respondent does not believe it necessary to cite case load statistics to this Court. However, we do call the Court's attention to the opinion in the 1879 case of *Whitney* v. *Look,* 99 U. S. 607, where the following was stated:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court

without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

RESPONDENT SUSTAINED SUBSTANTIAL DAMAGES BY REASON OF THE DELAY ATTRIBUTABLE TO THE PETITION FOR THE WRIT

The divorce judgment (Petition, Appendix "A", p. 46) awarded the Respondent $25,000.00 per year commencing February 7, 1970, for a period of 10½ years, and expressly provided that such payments were to be taxable to the Respondent and deductible to the Petitioner. The first two payments of $25,000.00 each (due 2/7/71 and 2/7/72) were superseded in the trial court in conjunction with petitioner's appeal to the Court of Appeals of Kentucky from the trial court's order denying his motion to set aside portion of the judgment. An additional installment of $25,000.00 became due on February 7, 1973. The Court of Appeals' original stay of its October 12, 1972 mandate for ninety (90) days from October 25, 1972, will cause Respondent to receive three (3) annual payments of $25,000.00 each during the calendar year 1973.

The Petitioner will be entitled to a full federal income tax deduction for the $75,000.00 payments he will make during 1973, and the Respondent will be required to report the entire $75,000.00 payments as taxable income in her 1973 federal income tax return. *Holahan* v. *C.I.R.* (C.A. 2, 1955), 222 F. 2d 82. Because alimony payments are not "earned income" as defined in 26 U.S.C.A. 1348(b)(1), the fifty percent (50%)

maximum rate on earned income under 26 U.S.C.A. 1348(a) will not apply to the $75,000.00 alimony payments, and Respondent will be subject to a tax rate of seventy per cent (70%)[2] on her net taxable income in excess of $38,000.00.

REASONABLE DAMAGES ARE $5,000.00

The proceedings in this Court gave Petitioner grounds to obtain a stay of the 1972 mandate of the Court of Appeals of Kentucky until January, 1973. This was done, and as a result Respondent will be required to report $75,000.00 of alimony income subject to a maximum tax rate of 70% for the calendar year 1973.

The additional federal income tax that Respondent will have to pay by reason of the delay directly resulting from the writ filed by Petitioner in this Court is $5,000.00 (20% x $25,000.00).

Reasonable damages under Rule 56(4) are not less than $5,000.00.

Respectfully submitted,

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Hopkinsville, Kentucky 42240

L. M. TIPTON REED
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Mayfield, Kentucky 42066

Attorneys for Respondent

[2]Respondent will file as "head of household" for calendar year 1973.

CERTIFICATE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered my appearance as counsel for Respondent in accordance with the rules; and that I have served 3 copies of the foregoing Respondent's Motion For Reasonable Damages Under Rule 56(4) upon Honorable John C. Lovett, Lovett and Lewis, Post Office Box 165, Benton, Kentucky 42025, said address being within 500 miles from that of the undersigned, by depositing same in the United States Post Office at Hopkinsville, Kentucky, first class, postage prepaid, on March 6, 1973, all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 6 day of March, 1973.

William E. Scent

WILLIAM E. SCENT
KEITH, SCENT, KIRKHAM & WALTON
317 West 9th Street
Hopkinsville, Kentucky 42240

IN THE

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October Term, 1972

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CLYDE W. REED - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - *Respondent*

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR REASONABLE DAMAGES UNDER RULE 56(4)

For response to Respondent's motion under Rule 56(4) for the award of reasonable damages for delay,[1] Petitioner respectfully submits that the motion should be denied for the following reasons:

I

The Petition for Writ of Certiorari Was Not Dilatory or Frivolous

Rule 56(2) provides that if an *appeal* appears to have been sued out for delay, damages at a rate "not exceeding 10 per cent" may be adjudged by the Court. This applies to appeals, not to petitions for writ of certiorari.

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[1]The motion, with undated certificate of service, was received by Petitioner's counsel on March 7, 1973.

Rule 56(4) applies to petitions for certiorari. It empowers this Court "in appropriate cases" to adjudge to respondent reasonable damages for his delay if there appears to be no grounds for granting the writ.

Petitioner does not know why his petition was denied. However, it is clear that

> The denial of a writ of certiorari imports no expression of opinion on the merits of the case as the bar has been told many times. *United States* v. *Carver*, 260 U. S. 482, 67 L. Ed. 361, 364, 43 S. Ct. 181.

This is not "an appropriate case" for adjudging damages. Petitioner did not file his petition for certiorari for purposes of delay. Rather, it was a good faith effort to obtain a judicial hearing on his motion, based upon changed circumstances and changes in the law, to modify the largest divorce judgment in the history of Kentucky. He believed that refusal of such a hearing denied procedural due process. In this connection, it should be noted that

> (a) Two of the seven judges on Kentucky's highest court, in a vigorous dissent, declared that the original judgment was erroneous and violative of a plainly written statute.
>
> (b) One of the seven judges, in a dissent, declared that the denial of a hearing on Clyde's motion to modify the judgment was "defective in so many respects" and was contrary to all precedent in Kentucky.

(c) One judge, a member of the majority of the Court, entered a 90 day stay order pending the filing of the petition for certiorari. It is unlikely that he would have done so if he had regarded the petition as dilatory or frivolous.

(d) Five judges extended the stay order until March 23, 1973. It is unlikely that they would have done so if they had regarded the quest for judicial review of their opinion as frivolous or dilatory.

Under these circumstances, and considering the amount involved, Petitioner submits that he would have been remiss if he had declined to exhaust every available legal remedy in an effort to obtain a simple hearing on his motion to modify.

II

Respondent Seeks to Pyramid Damages

We know of no instance in which this Court has regarded its power to adjudge damages as a weapon to discourage the filing of legitimate and good faith petitions. The right to seek judical review is too firmly embedded in our system of jurisprudence to be denied by the threat of imposing exemplary or punitive damages.

Here, Respondent already is well protected against loss. As Respondent says in her motion, two of the $25,000 payments were superseded in the trial court. Petitioner, therefore, already is absolutely liable for a minimum of 10% damages (or $5,000) under Kentucky

law. KRS 21.130. In addition, she will receive interest approximating $4,875.00.

Collection of the 1973 installment of $25,000, due on February 7, 1973, has not been delayed. In fact, on February 17, 1973, while the petition was still pending in this Court, Respondent had a Writ of Fieri Facias (Execution) issued to enforce collection of this installment. A copy of that Writ is attached hereto as Appendix A.

Respondent seeks to superimpose 10% damages on $50,000 in this Court on the 10% damages on $50,000 she will automatically receive under KRS 21.130. We respectfully submit that an allowance of damages of 20% for delay in collecting the two payments would be exhorbitant and punitive.

This is not all. Despite issuance of execution, Respondent undoubtedly will request the Kentucky Court of Appeals to award her an additional 10% damages (under KRS 21.130) on the $25,000 installment which came due on February 7, 1973, on the theory that the stay order entered by the Kentucky Court of Appeals constituted a supersedeas. If she succeeds, the reward to her and the penalty to Petitioner will increase by $2,500.

WHEREFORE, Petitioner respectfully submits that Respondent's Motion should be denied.

Respectfully submitted,

JOHN C. LOVETT
LOVETT AND LEWIS
P. O. Box 165
Benton, Kentucky 42025
Attorneys for Petitioner

CERTIFICATE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered by appearance as counsel for Petitioner in accordance with the Rules of this Court; and that I have served three (3) copies of the foregoing Response upon Honorable William E. Scent, Keith, Scent, Kirkham and Walton, 317 West 9th Street, Hopkinsville, Kentucky 42240, and upon Honorable L. M. Tipton Reed, Neely, Reed and Bryan, Lawpart Building, Mayfield, Kentucky 42066, attorneys for Respondent, by depositing same in a United States Post Office, first class mail, postage prepaid, (said addresses being within 500 miles from that of the undersigned) on March 15, 1973, all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 15th day of March, 1973.

John C. Lovett

JOHN C. LOVETT
LOVETT AND LEWIS
P. O. Box 165
Benton, Kentucky 42025

APPENDIX A

MARSHALL CIRCUIT COURT

Civil Action No. 2047

JEAN MOORE REED - - - - - - - *Plaintiff*

v.

CLYDE W. REED - - - - - - - *Defendant*

WRIT OF FIERI FACIAS (EXECUTION)

The Commonwealth of Kentucky,

To the Sheriff of Marshall County, Greeting:

We command you that of the estate of CLYDE W. REED you cause to be made the sum of Twenty-Five Thousand Dollars ($25,000.00) with interest thereon, at the rate of six percent (6%) per annum, from the 7th day of February, 1973, until paid, which JEAN MOORE REED late in our Marshall Circuit Court has recovered against CLYDE W. REED for alimony, whereof the defendant, CLYDE W. REED, convicted as appears to us of record, and that you have the said sums of money before our court on Friday, April 6, 1973, to render to the said JEAN MOORE REED her alimony, interest and costs aforesaid, and have then and there this writ.

Witness, W. J. BRIEN, JR., clerk of the Marshall Circuit Court, this 17 day of February, 1973.

(s) W. J. BRIEN, JR.
Clerk